



May 7, 2020

VIA FOIAONLINE.REGULATIONS.GOV

U.S. Environmental Protection Agency

Re: Freedom of Information Act Request: Endangered Species Act Section 7 Consultation Review Regarding the Current National Ambient Air Quality Review for Particulate Matter, Ozone, Nitrogen oxides (NOx), and Sulfur oxides (SOx).

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), from the Center for Biological Diversity (“Center”), a non-profit organization. The Center’s mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands and waters, and public health through science, policy, and environmental law. Based on the understanding that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked, the Center is working to secure a future for animals and plants hovering on the brink of extinction, for the ecosystems they need to survive, and for a healthy, livable future for all of us. The Center works through science, law, and creative media, and works to fulfill the continuing educational goals of its membership and the general public in the process.

REQUESTED RECORDS

The Center requests from the U.S. Environmental Protection Agency (“EPA”):

1. From March 18, 2013 to the date EPA conducts this search, the records generated in connection with the Endangered Species Act, §§ 1531-1544 (“ESA”) Section 7 consultation activities undertaken by EPA in connection with the U.S. Environmental Protection Agency’s (“EPA”) current review of the Particulate Matter National Ambient Air Quality Standards and Criteria Document which EPA has assigned Docket No. EPA-HQ-OAR-2015-0072 (FRL-10008-31-OAR);
2. From December 28, 2015 to the date EPA conducts this search, the records generated in connection with ESA Section 7 consultation activities undertaken by EPA in connection with the EPA’s current review of the Ozone National Ambient Air Quality Standards and Criteria Document which EPA has assigned Docket No. EPA-HQ-OAR-2018-0279;
3. From May 18, 2018 to the date EPA conducts this search, the records generated in connection with ESA Section 7 consultation activities undertaken by EPA in connection with the EPA’s current review of the primary nitrogen oxides National Ambient Air

Quality Standard and Criteria Document. We do not believe EPA has assigned this a docket number as of today;

4. From April 17, 2019 to the date EPA conducts this search, the records generated in connection with ESA Section 7 consultation activities undertaken by EPA in connection with the EPA's current review of the primary sulfur oxides National Ambient Air Quality Standard and Criteria Document. We do not believe EPA has assigned this a docket number as of today; and
5. From June 4, 2012 to the date EPA conducts this search, the records generated in connection with ESA Section 7 consultation activities undertaken by EPA in connection with EPA's current review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen, Oxides of Sulfur and Particulate Matter and Criteria Document which EPA has assigned Docket No. EPA-HQ-OAR-2014-0128.

For this request, the term "records" refers to, but is not limited to, documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, letters, notes, recordings, telephone records, voicemails, telephone notes, telephone logs, text messages, chat messages, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

The Center is willing to receive records on a rolling basis.

FOIA's "frequently requested record" provision was enacted as part of the 1996 Electronic Freedom of Information Act Amendments, and requires all federal agencies to give "reading room" treatment to any FOIA-processed records that, "because of the nature of their subject matter, the agency determines have become the subject of subsequent requests for substantially the same records." *Id.* § 552(a)(2)(D)(ii)(I). Also, enacted as part of the 2016 FOIA Improvement Act, FOIA's Rule of 3 requires all federal agencies to proactively "make available for public inspection in an electronic format" "copies of records, regardless of form or format ... that have been released to any person ... and ... that have been requested 3 or more times." *Id.* § 552(a)(2)(D)(ii)(II). Therefore, we respectfully request that you make available online any records that the agency determines will become the subject of subsequent requests for substantially the same records, and records that have been requested three or more times.

Finally, agencies must preserve all the records requested herein while this FOIA is pending or under appeal. The agency shall not destroy any records while they are the subject of a pending request, appeal, or lawsuit under the FOIA. 40 C.F.R. § 2.106; *see Chambers v. U.S. Dept. of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) ("[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA or the Privacy Act"). If any of the requested records are destroyed, the agency and responsible officials are subject to attorney fee awards and sanctions, including fines and disciplinary action. A court held an agency in contempt for "contumacious conduct" and ordered the agency to pay plaintiff's costs and fees for destroying "potentially responsive material contained on hard drives and email backup tapes." *Landmark Legal Found. v. EPA*, 272 F. Supp.2d 59, 62 (D.D.C. 2003); *see also Judicial Watch, Inc. v. Dept. of Commerce*, 384 F. Supp. 2d 163, 169 (D.D.C. 2005) (awarding attorneys' fees and costs because, among other factors, agency's "initial search was unlawful and egregiously mishandled and ...likely responsive documents were destroyed and removed"), *aff'd in relevant part*, 470 F.3d 363, 375 (D.C. Cir. 2006) (remanding in part to recalculate attorney fees assessed). In another case, in addition to imposing a \$10,000 fine and awarding attorneys' fees and costs, the court found that an Assistant United States Attorney prematurely "destroyed records responsive to [the] FOIA request while [the FOIA] litigation was pending" and referred him to the Department of Justice's Office of Professional Responsibility. *Jefferson v. Reno*, 123 F. Supp. 2d 1, 6 (D.D.C. 2000).

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. 5 U.S.C. § 552(a)(3)(B) ("In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."). "Readily accessible" means text-searchable and OCR-formatted. *See id.* Pursuant to this requirement, we

hereby request that you produce all records in an electronic format and in their native file formats. Additionally, please provide the records in a load-ready format with a CSV file index or Excel spreadsheet. If you produce files in .PDF format, then please omit any “portfolios” or “embedded files.” Portfolios and embedded files within files are not readily accessible. **Please do not provide the records in a single, or “batched,” .PDF file.** We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. *Id.* § 552(b). Please correlate any redactions with specific exemptions under FOIA.

RECORD DELIVERY

We appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. *Id.* § 552(a)(6)(A)(i); 21 C.F.R. § 20.41(b). Failure to comply within the statutory timeframe may result in the Center taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. We prefer email, but you may mail copies of records to:

Ann K. Brown
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211
foia@biologicaldiversity.org

If you find that this request is unclear, or if the responsive records are voluminous, please email me to discuss the scope of this request.

REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA’s basic purpose is to “open agency action to the light of public scrutiny,” with a focus on the public’s “right to be informed about what their government is up to.” *NARA v. Favish*, 541 U.S. 157, 171 (2004) quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA’s fee waiver provision requires that “[d]ocuments shall be furnished without any charge or at a [reduced] charge,” if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA’s fee waiver requirement is “liberally construed.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as the Center access to government records without the payment of fees. Indeed, FOIA’s

fee waiver provision was intended “to prevent government agencies from using high fees to discourage certain types of requesters and requests,” which are “consistently associated with requests from journalists, scholars, and *non-profit public interest groups*.” *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, “[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information” 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

I. The Center Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). EPA’s regulations at 40 C.F.R. § 2.107(l)(1)-(3) establish the same standard.

Thus, EPA must consider six factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns “the operations or activities of the Federal government,” (2) whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) whether the disclosure “will contribute to public understanding” of a reasonably broad audience of persons interested in the subject, (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. *Id.* § 2.107(l)(2), (5) whether a commercial interest exists and its magnitude, and (6) the primary interest in disclosure. As shown below, the Center meets each of these factors.

A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of EPA. This request asks for: (1) from March 18, 2013 to the date EPA conducts this search, the records generated in connection with the Endangered Species Act, §§ 1531-1544 (“ESA”) Section 7 consultation activities undertaken by EPA in connection with EPA’s current review of the Particulate Matter National Ambient Air Quality Standards and Criteria Document which EPA has assigned Docket No. EPA-HQ-OAR-2015-0072 (FRL-10008-31-OAR); (2) from December 28, 2015 to the date EPA conducts this search, the records generated in connection with ESA Section 7 consultation activities undertaken by EPA in connection with the EPA’s current review of the Ozone National Ambient Air Quality Standards and Criteria Document which EPA has assigned Docket No. EPA-HQ-OAR-2018-0279; (3) from May 18, 2018 to the date EPA conducts this search, the records generated in connection with ESA Section 7 consultation activities undertaken by EPA in connection with the EPA’s current review of the primary nitrogen oxides National Ambient Air Quality Standard and Criteria Document. We do not believe EPA has assigned this a docket number as of today; (4) from April 17, 2019 to the date EPA conducts this search, the records generated in connection with ESA Section 7 consultation activities undertaken by EPA in connection with the EPA’s current review of the primary sulfur oxides National Ambient Air Quality Standard and Criteria Document. We do not believe EPA has assigned this a docket number as of today; and (5) from June 4, 2012 to the date EPA conducts this search, the records

generated in connection with ESA Section 7 consultation activities undertaken by EPA in connection with EPA's current review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen, Oxides of Sulfur and Particulate Matter and Criteria Document which EPA has assigned Docket No. EPA-HQ-OAR-2014-0128.

The subject matter of this request concerns the operations and activities of EPA, a government agency. This FOIA will provide the Center and the public with crucial insight into EPA's compliance with its consultation obligations under the ESA. It is clear that a federal agency's consultation obligation under federal law is a specific and identifiable activity of the government, and in this case it is the executive branch agency of EPA. *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, the Center meets this factor.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

The records requested through this FOIA request are meaningfully informative. Disclosure of the requested records will allow the Center to convey to the public information about steps EPA may have taken to assess whether the new National Ambient Air Quality Standards, or lack thereof, and Criteria Documents will jeopardize the continued existence of species listed under the ESA or adversely modify critical habitat. *See generally*, Attachment A (Media Reports). Responsive records will provide insight into the extent to which the National Ambient Air Quality Standards, or lack thereof, and Criteria Documents may incidentally take listed species, and the specific measures the government must carry out to minimize and mitigate those adverse effects. Furthermore, the records will further enhance the public's understanding of EPA's and EPA's compliance with its ESA obligations. Once the information is made available, the Center will analyze it and present it to its 1.7 million members and online activists and the general public in a manner that will meaningfully enhance the public's understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of EPA's operations and activities.

A. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of ESA Consultation on National Ambient Air Quality Standards and Criteria Documents.

The requested records will contribute to public understanding of whether EPA's actions are consistent with the ESA. As explained above, the records will contribute to public understanding of this topic.

Activities of EPA generally, and specifically the environmental impact of the revised National Ambient Air Quality Standards, or lack thereof, and Criteria Documents are areas of interest to a reasonably broad segment of the public. The Center will use the information it obtains from the disclosed records to educate the public at large about this topic. *See W. Watersheds Proj. v. Brown*, 318 F. Supp.2d 1036, 1040 (D. Idaho 2004) (finding that “WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment”).

Through the Center’s synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained in and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F. Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dept. of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (applying “public” to require a sufficient “breadth of benefit” beyond the requester’s own interests); *Cnty. Legal Servs. v. Dep’t of Hous. & Urban Dev.*, 405 F. Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester’s “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public that is interested in its work”).

Indeed, the public does not currently have an ability to easily evaluate the requested records, which are not currently in the public domain. *See Cnty. Legal Servs.*, 405 F. Supp.2d at 560 (because requested records “clarify important facts” about agency policy, “the CLS request would likely shed light on information that is new to the interested public.”). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations... .”¹

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of what effects the revisions of the National Ambient Air Quality Standards, or lack thereof, and Criteria Documents will have on species listed under the ESA and their critical habitat. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about the fate of endangered and threatened species.

¹ In this connection, it is immaterial whether any portion of the Center’s request may currently be in the public domain because the Center requests considerably more than any piece of information that may currently be available to other individuals. *See Judicial Watch*, 326 F.3d at 1315.

II. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

The Center is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding of EPA's conservation efforts, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about this subject matter.

The records are also certain to shed light on EPA's compliance with the ESA. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Center meets this factor as well.

III. Obtaining the Requested Records is of No Commercial Interest to the Center.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than over 1.7 million members and online activists dedicated to the protection of endangered and threatened species and wild places. The Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

IV. The Center's Primary Interest in Disclosure is the Public Interest.

As stated above, the Center has no commercial interest that would be furthered by disclosure. Although even if it did have an interest, the public interest would far outweigh any pecuniary interest.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the activities of numerous government agencies for over 30 years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center's fee waivers, agencies have recognized: (1) that the information requested by the Center contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center's track record of active participation in oversight of governmental activities and decision making, and its consistent contribution to the public's understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

The Center's work appears in over 5,000 news stories online and in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, *The Guardian*, and *Los Angeles Times*. Many media outlets have reported on government compliance with federal environmental laws utilizing information obtained by the Center from federal agencies utilizing information obtained by the Center from federal agencies, including EPA. In 2019, more than 2.9 million people visited the Center's extensive website, and viewed pages a total of 5.3 million times. The Center sends out more than 297 email newsletters and action alerts per year to more than over 1.7 million members and supporters. Three times a year, the Center sends printed newsletters to more than 74,500 members. More than 561,000 people follow the Center on Facebook, and there are regular postings regarding environmental protection. The Center also regularly tweets to more than 85,000 followers on Twitter.

Public oversight and enhanced understanding of EPA's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney*, 19 F.3d 807. The Center need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. *Id.*

V. Conclusion

For all of the foregoing reasons, the Center qualifies for a full fee waiver. We hope that EPA will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,



Ann K. Brown
Open Government Coordinator
CENTER FOR BIOLOGICAL DIVERSITY
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Attachment

Attachment A (Media Reports)

Attachment A

THE LEADER IN ENERGY AND ENVIRONMENT NEWS

AIR POLLUTION

EPA soot rule coming soon after White House wraps up review

Sean Reilly, E&E News reporter

Published: Monday, April 13, 2020



The White House Office of Information and Regulatory Affairs has finished reviewing EPA rulemaking on soot. Ian Barbour/Flickr

EPA could soon release a closely scrutinized proposal that would set national soot standards for years to come after a branch of the White House budget office completed a routine review Friday.

The review by the Office of Information and Regulatory Affairs ended a little more than a month after EPA sent the draft rule over, according to a government tracking website.

While EPA is under a self-imposed timetable to make the proposal public this month, that isn't expected to happen today. In an email this morning, a spokeswoman said the agency intends to issue it this spring.

The proposal would incorporate EPA Administrator Andrew Wheeler's preliminary decision on whether changes are need to the National Ambient Air Quality Standards for particulate matter and, specifically, the fine particles known as PM_{2.5} because they are no more than 2.5 microns in diameter, or one-thirtieth the width of a human hair.

More commonly dubbed soot, those fine particles are already closely tied to a variety of cardiovascular and respiratory problems.

In a study released last week, Harvard University researchers also tied long-term exposure to slightly higher levels of fine particles to a sharply increased risk of death from COVID-19, the disease caused by the novel coronavirus ([Greenwire](#), April 7).

Under the Clean Air Act, EPA is supposed to periodically review and, if needed, revamp the standards for particulate matter based on available scientific research into its health and environmental effects.

Drawing on recent studies, EPA career staff last year concluded the existing annual threshold, set in 2012, needs strengthening to prevent a substantial number of premature deaths.

But a divided advisory panel, made up mostly of Wheeler appointees, later rejected that conclusion on the grounds the evidence was not solid enough ([Greenwire](#), Dec. 4, 2019).

Many observers expect Wheeler, a former lobbyist whose clients included the nation's largest privately owned coal company, to adopt the panel's recommendation to stick with the status quo. Under the same self-set schedule, he plans to issue the final rule by year's end.

The annual fine particulate exposure standard is 12 micrograms per cubic meter of air; EPA has also set a daily limit of 35 micrograms per cubic meter.

OIRA, a part of the White House Office of Management and Budget, ended its review Friday even though two environmental groups, the Environmental Law and Policy Center and Moms Clean Air Force, had previously scheduled meetings on the proposed rule.

Representatives for both organizations said they got notification that the meetings — which usually include involvement of EPA and OIRA staff and have lately been taking place via teleconference — were canceled at around 2 a.m. Saturday.

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AIR POLLUTION

Trump's soot proposal bucks advice of EPA career staff

Sean Reilly, E&E News reporter • Published: April 14, 2020 at 9:48 AM



EPA headquarters. Francis Chung/E&E News

EPA Administrator Andrew Wheeler is proposing to leave the agency's existing soot standards in place for years to come — delivering a win for industry over the conclusions of agency career staff.

Under the plan, EPA would keep the existing limits on fine particulate matter set in 2012.

Those particles, technically known as PM_{2.5}, are associated with a variety of respiratory and cardiovascular ailments; in a study released last week, Harvard University researchers tentatively linked long-term exposure to even slightly higher levels of fine particles to sharply increased odds of death from COVID-19.

Under the Clean Air Act, particulate matter is one of a half-dozen pollutants for which EPA must periodically review its National Ambient Air Quality Standards in light of the latest research into their health and environmental effects.

Business groups like the American Petroleum Institute and U.S. Chamber of Commerce, however, oppose any change to the status quo for the soot standard.

In a draft report last year, EPA air staffers had found that the existing limits may be allowing thousands of premature deaths each year. They tentatively concluded that the evidence warranted a significant tightening of the annual average exposure threshold, currently set at 12 micrograms per cubic meter of air ([E&E News PM](#), Sept. 5, 2019).

An EPA advisory panel mostly made up of Wheeler appointees later rejected those staff findings on the grounds that the underlying research was unconvincing. The panel, known as the Clean Air Scientific Advisory Committee, recommended that both the annual standard and the 24-hour limit of 35 micrograms per cubic meter of air be left in place ([Greenwire](#), Dec. 4, 2019).

The review, set for completion by this December, has been dogged by turmoil and questions about its scientific validity.

In an unprecedented step, for example, Wheeler in late 2018 fired a group of mostly academic experts charged with providing added know-how to the committee, usually known by its acronym CASAC ([Greenwire](#), Oct. 12, 2018).

Those experts then unofficially regrouped under the auspices of the Union of Concerned Scientists to produce a report calling both for stricter annual and 24-hour PM_{2.5} limits ([Greenwire](#), Dec. 4, 2019).

Wheeler, meanwhile, appointed an alternative group of consultants to aid in the review. As E&E News previously reported, the bulk of those consultants have ties either to CASAC members or to groups with a stake in the rule's outcome ([Greenwire](#), Feb. 8).

PM_{2.5}, often dubbed soot, refers to particles that are no more than 2.5 microns in diameter, or one-thirtieth the width of a human hair. Assuming that EPA meets its self-imposed December deadline for completing the review, the standards will remain in place for at least five years unless a federal court rules otherwise. Whatever the review's ultimate outcome, a legal challenge is likely.

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THE LEADER IN ENERGY AND ENVIRONMENT NEWS

AIR POLLUTION

Wheeler dismisses research on tighter soot limit

Sean Reilly, E&E News reporter • Published: Tuesday, April 14, 2020



Smokestack air emissions from the Cleveland-Cliffs Northshore Mining Co. in Silver Bay, Minn. Tony Webster/Flickr

EPA Administrator Andrew Wheeler today proposed leaving national soot standards unchanged at least through the middle of the next decade as he questioned the reliability of scientific research suggesting that tighter limits are needed to save lives.

"There's still a lot of uncertainty" surrounding that research, Wheeler told reporters on a conference call announcing his decision to leave the 2012 standards on fine particulate matter in place. Wheeler said he considered "the latest scientific evidence and analysis," as well the recommendations of an EPA advisory panel that favored the status quo despite the conclusions of agency career staff.

"We believe that the current standard is protective of public health," Wheeler said.

While Harvard University researchers recently linked long-term exposure to slightly increased levels of fine particles to sharply higher death rates during the COVID-19 pandemic, Wheeler noted that their work had not yet undergone peer review. He also questioned the authors' impartiality after they criticized the agency's decision to relax enforcement because of the outbreak ([Greenwire](#), April 7).

While the study is "certainly interesting," Wheeler said, "I think it's premature to draw any conclusions."

His preliminary decision to keep the existing particulate matter standards, incorporated in a [proposed rule](#) also signed today, was expected. It marks a major win for business groups that oppose stricter standards and point to broader improvements in air quality over the years ([Greenwire](#), April 14).

Many industry organizations "agree that EPA's proposed rule is a smart balance that will further reduce emissions and help protect public health while meeting America's energy needs," Frank Macchiarola, senior vice president of policy, economics and regulatory affairs at the American Petroleum Institute, said in a statement today.

Environmental groups, however, charged that the status quo proposal ignores the findings of career employees that a tighter annual limit is needed to prevent thousands of premature deaths. They questioned the truncated review process used.

"EPA must withdraw this rule and replace it with a proposal that tightens the standards to be consistent with the latest scientific knowledge," Hayden Hashimoto, an attorney with the Boston-based Clean Air Task Force, said in a release.

Also assailing the proposal was House Energy and Commerce Chairman Frank Pallone (D-N.J.).

"Today's announcement is a callous refusal to fulfill EPA's duty to protect human health and the environment, and yet another failure of leadership from the Trump administration," Pallone said. "The health and lives of more Americans will be needlessly put at risk because of it."

Under a fast-track schedule set two years ago, Wheeler plans to issue a final verdict by December. The draft rule will carry a 60-day public comment period when published in the *Federal Register*.

Claims of 'rigged' process loom over decision

Fine particulate matter, technically known as PM_{2.5} because it is no bigger than 2.5 microns in diameter, or one-thirtieth the width of a human hair, is linked to a

variety of lung and cardiovascular problems, including a higher risk of premature death in some circumstances.

Under the Clean Air Act, PM2.5 is among a half-dozen pollutants for which EPA is supposed to review its National Ambient Air Quality Standards every five years to determine whether any changes are needed, based on research into their health and environmental effects.

The current review of the particulate matter thresholds effectively got underway in 2015; under an official schedule, it had originally been set for completion in 2022. Under the accelerated timetable set two years ago by Wheeler's predecessor, Scott Pruitt, the deadline was pushed up to 2020 on the grounds that EPA needed to do a better job of complying with the five-year review cycle. With the help of a membership policy that now bars researchers who receive agency grants, Pruitt and Wheeler also reshuffled the Clean Air Scientific Advisory Committee, the seven-member panel charged with providing outside expertise during the reviews.

Under the chairmanship of Tony Cox, a Denver-based consultant who has done work for the petroleum institute and other industry groups, the committee, usually known by its acronym CASAC, has played a critical role in the assessment of the particulate matter limits. Last year, it voted to override the preliminary findings of career employees that a stronger annual exposure limit was needed ([Greenwire](#), Dec. 4, 2019).

Cox and other committee members said the research underlying those findings was inconclusive. Wheeler, who in 2018 also dismissed an auxiliary group of scientists that had been providing added know-how during the review, repeatedly cited CASAC's conclusions during this morning's call.

Wheeler "has rigged this process to get the result he wanted," Gretchen Goldman, research director at the Union of Concerned Scientists' Center for Science and Democracy, said in a statement. "This decision comes as no surprise, but it's appalling nonetheless."

In response, Wheeler said today that Cox and other CASAC members were vetted for conflicts of interest, adding that they had all approached the review "with the highest scientific integrity, and I have no reason to discount any of the advice that they've given me." As he has in the past, Wheeler described his October 2018 decision to dismiss the auxiliary panel as a streamlining move prompted by EPA's chronic failures to meet the five-year deadline laid out in the Clean Air Act.

Based on that time frame, he said, "we have to take a snapshot based on the science that we have and the recommendations that the administrator receives both from the staff as well as CASAC."

The current annual standard for fine particles is 12 micrograms per cubic meter of air; the daily exposure limit is 35 micrograms per cubic meter. EPA career staff had concluded that the evidence warranted cutting the annual threshold to at least 10 micrograms but found no change was needed to the daily limit.

Under an alternative review underwritten by the Union of Concerned Scientists, the auxiliary panel of scientists regrouped unofficially last fall and called for tightening the yearly standard to somewhere between 8 and 10 micrograms per cubic meter of air, accompanied by a reduction in the daily limit to something in the range of 25 to 30 micrograms.

The particulate matter standards also cover the coarse particles technically known as PM10, which currently carry a daily exposure threshold of 150 micrograms. EPA career staff found no grounds for changing that status quo.

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